IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CENTOCOR, ET AL	*	Civil Docket No.
	*	2:07-CV-139
VS.	*	Marshall, Texas
	*	
	*	June 29, 2009
ABBOTT LABORATORIES	*	8:30 A.M.

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE JUDGE T. JOHN WARD
UNITED STATES DISTRICT JUDGE
AND A JURY

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P R O C E E D I N G S

COURT SECURITY OFFICER: All rise.

(Jury in.)

THE COURT: All right. Please be seated.

Good morning, Ladies and Gentlemen. Hope y'all had a good weekend.

Good morning, Counsel. I spoke to some of you briefly.

We will hear final arguments this morning, Ladies and Gentlemen, and I anticipate you will have this case sometime before 11 o'clock this morning by the time we get everybody finished up here.

First, we'll hear from the Plaintiff. Ms. Elderkin.

MS. ELDERKIN: May it please the Court, Ladies and Gentlemen.

My name is Dianne Elderkin. As you know, I'm here representing Centocor, and I've never made a human antibody.

Now, you heard counsel ask that question of every single Centocor witness who got on the stand, whether they were scientists, a businessman, or a lawyer. And I want you to know that that is a sideshow.

That's not what the issue in this case is.

The issue is not who made a human antibody first. The issue is what I told you last Monday when I first spoke to you. If somebody uses somebody else's property without permission, they should pay for it.

And we've shown you that Humira, Abbott's product, infringes our property, our patent. And we've shown you that based on the $11 billion worth of sales that Humira has made since our patent issued, fair and reasonable compensation to Centocor is about $2.1 billion.

Now, you've heard about the invention,

that Centocor and NYU inventors made a special kind of antibody, an antibody that binds tightly to TNF so that it can cause less harm in the body, an antibody that competes with A2, the special antibody for binding A2 to TNF, and it binds to a neutralizing epitope.

There are two versions of this antibody: A chimeric version and a human version. Centocor opted to commercialize the chimeric version first. And you heard from Dr. Ghrayeb and also from Mr. Scodari.

They said it wasn't that Centocor couldn't have made a human antibody. They were a company with limited resources; they were a small company back then; and they had to pick a project. They picked to make the chimeric antibody and commercialize that.

And it was a good bet; it was a ringer, because that product, which they commercialized as Remicade in 1999, has been used for the last 10 years to safely and effectively treat over a million patients.

Abbott chose the other version of the invention. They chose to make a human antibody, their product, Humira. As we've shown you, that product infringes our patent.

Now, before I talk about the particular questions you're going to be asked to decide, I want to

remind you about the burdens of proof that you've already heard about several times and you'll hear about later today.

For Centocor to prove infringement, to prove that Humira infringes, we have to prove that by the preponderance of the evidence. We have to persuade you that our claim that it infringes is more likely true than not; that the scales tip ever so slightly in Centocor's favor.

For Abbott to prove that the Patent Office got it wrong, that the patent is not valid, they have to prove that by the preponderance of the evidence standard, and that's a stricter standard. They have to prove that it is -- that you are persuaded that it's highly probable -- highly probable that the Patent Office made a mistake. And that means the scales tip much more in Abbott's favor than is required for us to show infringement.

Now, let me talk a little bit about infringement. You remember this slide that I showed you in my opening. This slide sets forth all the parts of our claims, of the four claims that are in issue here.

And you remember I told you that the parts that are checked off in red, Abbott doesn't dispute that at all. They've admitted that Humira has

every single one of those parts of our claim.

The only part that they dispute is the part with the blue checks. But we showed you that Humira does compete with A2 for binding to TNF. We showed you several kinds of evidence in that regard.

Remember Dr. -- not doctor -- Ms. Susan Tam, Centocor's scientist, came and told you about the tests she did. This notebook is in evidence, her notebook, PX854. You can see the careful work that she did.

Dr. Adams, who is standing up to remind you who he is, was here, and he looked at Susan Tam's data. He talked to her at length about it. He looked at it. He said it was impeccable. And he said that it shows that Humira does compete with A2 for binding to TNF.

Dr. Marks also looked at that data. He had no problems with the quality of the data. He just said she didn't do the tests the right way. She did it in the wrong direction. But he had no evidence, no evidence, no data. He presented nothing to show you that it would make any difference, that it would make any difference if she had tested the A2 and Humira in a different direction.

What did he say?

Well, he tried to point you to an article, a Moller article, and tried to convince you that because of this Moller article, it really does matter which direction you do the test in. And you might remember this slide that Ms. Mullin marked up when she was questioning Dr. Marks.

Remember, he admitted that even though he was relying on the Moller article to try to convince you that for some antibodies, it makes a difference which direction -- which direction you test them in, he had to admit that the Moller article does not show an antibody that competes in one direction but not in the other. All Moller talked about on the one hand is an antibody that influences another. So Moller does not support that position.

Even if there were -- even if you were to agree that it makes a difference which direction you test the antibodies in, we have data that shows you that you can test A2 with Humira in either direction, and it shows competition. And that evidence comes right from Abbott's own files.

This is Plaintiffs' Exhibit 137, and it's a study that was done by Dr. Zehra Kaymakcalan, an Abbott scientist, in which she tested competition for Remicade and Humira.

Now, that's cA2, not A2, but her tests showed competition in either direction. And you heard from Dr. Ghrayeb, and you also heard from Dr. Adams that A2 and cA2 have the exact same binding regions; they bind identically. So if you have a test that shows that cA2 competes, it shows that A2 competes.

Abbott's own tests from Dr. Kaymakcalan shows Humira competes no matter which direction you do the test.

Now, Abbott might argue no, no, no; you can't go there, Centocor, because you changed your claims in the Patent Office. Your claims originally said compete with cA2 or A2, but you took that cA2 out.

Remember, they didn't ask Dr. Marks about that. They only asked Dr. Adams about that. And when he had a chance to look at the file history on questioning from Ms. Mullin, he explained to you that when that change was made at the Patent Office, it was only a matter of paperwork. It had nothing to do with the Patent Office saying that the binding of cA2 and A2 are different things. It was a matter of paperwork.

So when you get to Question No. 1 in the jury's verdict form back in the jury room, we are asking you to answer yes to each of these questions, that we have proven to you by a preponderance of the evidence

that Humira infringes each one of the four claims at issue here.

Now, Abbott has some excuses, and you've heard about them. They say the Patent Office made a mistake and never should have issued the patent. But they have to prove that, again, by clear and convincing evidence.

Their first excuse, they say the claims are old. What's disclosed in these claims was disclosed earlier in the Adair 1992 publication. But I want you to remember something. For anticipation, you're going to hear that the earlier reference, the Adair reference, has not only disclosed everything that's in our claims, it has to disclose them arranged in the same way as in our claims.

I want you to think about a buffet, and if you had a patent claim that said a plate that has mashed potatoes, meatloaf, and string beans on it is not enough to go for somebody to point to a buffet and say hey, there are masked potatoes, meatloaf, and string beans on that buffet along with a bunch of other things. To anticipate, the plate has to already have the three things on it the same way as arranged in the claim.

So what's Abbott saying here?

They're looking at that Adair reference,

and they're saying that the plate is the CDP571 antibody. But we've got a problem with that. If you remember, this is the chart that Ms. Mullin marked up when she was questioning Dr. Marks, Abbott's expert. And there's several things that the CDP571 antibody does not have.

First of all, the claim requires in the third row there, it has to bind to a neutralizing epitope of human TNF in vivo. That's the human TNF in the body. The only test, only test in the Adair reference with CDP571 antibody is in a baboon. Baboon TNF, Ladies and Gentlemen, not human TNF.

For that reason alone, you can decide that the Adair reference does not anticipate.

But there's another reason. Claims 14 and 15, which are the particular ones on this slide, require a particular kind of antibody, one that has an IgG1 constant region. And that's referred there, the first row. CDP571; it's not IgG1; it's IgG4.

There's another problem. The claims all require, as shown in the second row here, that the antibodies competitively inhibit binding of A2 to TNF-alpha.

Now, the Adair reference is completely silent on whether the CDP571 competes with A2. So

Abbott had to do some tests.

What did they do?

Dr. Marks was here. He told you about testing that was done by an outfit called Veritas, and the gentleman there who did the testing was Dr. Kincaid.

Well, Dr. Kincaid wasn't here for you to see or hear, and his test results are not even in evidence. There's no notebook in evidence from Dr. Kincaid so you can see how careful his work was.

Dr. Marks also said before he came to his opinion about whether there was anticipation, he never even talked to Dr. Kincaid, never even picked up the phone and talked to him. If he had, he might have heard that there were some problems with Dr. Kincaid's testing.

One thing he might have heard was that Dr. Kincaid didn't even do the test himself; his brother did. And if you remember from the tape, he couldn't even tell us what kind of education his brother had. If he had talked to Dr. Kincaid, he would have realized that there were real flaws in the test. Remember, Dr. Adams looked at them, and he told you, if one of my graduate students had brought me this work, I would have sent them back to the lab to do it all over again.

But maybe the biggest problem we have

with the Dr. Kincaid testing is we don't even know what he tested. We don't even know what he tested.

For the test to be meaningful, it has to be a CDP571 antibody that was available before 1994. You remember that vial that you looked at that was passed around, it had no pre-1994 date on it. It said 2008.

It also said CDP571P up in the corner. We don't know what that is and if that's a different version of an antibody. And nobody here told you anything about that sample. You had to hear from -- it from Dr. Adams at the very end of the trial.

One little other bit of information to consider, the Patent Office, they considered the Adair reference. This is right from the references cited portions on the second page of the patent. The number is 9,211,383. That's the number for the Adair reference.

The Patent Office considered it. If they thought that the Adair reference disclosed the invention of our claims, they couldn't have issued our patent.

Now, you may hear from Mr. Lee that, well, the Patent Office didn't have Dr. Kincaid's testing so how could they have made a full analysis here.

Well, the Patent Office didn't have to have Dr. Kincaid's testing to know that baboon TNF isn't human TNF and to know that an IgG4 antibody is not an IgG1 antibody.

Abbott simply has not proven, and certainly not by a clear and convincing standard, that the Adair reference anticipates our claims. But they have another argument. They say that their own patent, the Salfeld patent, anticipates our claims, but there's something important here for you to remember. And this goes back to this timeline that we looked at during Mr. Salfeld's testimony and I wrote on it.

Abbott's Salfeld patent application was filed in February of 1996. But remember, we filed a very important patent application two years earlier, in February 1994.

Dr. Salfeld's later patent application can only make our patent invalid, can only anticipate our claims, if Abbott is able to prove that our 1994 application didn't have a written description of human antibodies and didn't have an enabling description of human antibodies.

Again, it's their burden to prove it, to prove that there wasn't enough in that 1994 application. It's not our burden to prove otherwise.

Let's talk a little bit about written description. Now, you've heard an awful lot of witnesses talking about who made human antibodies first, who made them at all. And, again, that is not the issue here.

Abbott is not asserting that they have a prior invention defense. The only issue is whether, in our '94 application, we had a written description and enabling disclosure.

Now, Abbott says in that 1994 application we didn't describe our invention of human antibodies. And, Ladies and Gentlemen, I ask: What are they talking about?

You remember Dr. Ghrayeb, our inventor, pointed -- pointed you to this. Right in the summary of the invention of our patent, right where it's the summary of the invention, he talked about the types of antibodies include chimeric and human antibodies. And that was in the 1994 application.

But we do more than just use the words human antibodies. We also disclose the structure of the antibodies. Here in Column 18 -- and Dr. Ghrayeb pointed you to this -- we talk about the human TNF variable region. Remember, that's part of the structure of the antibody, the top of the Y. This was added in

1994 as well.

In Column 19, there's more reference to the structure of the antibodies, talking about the heavy and light chain antigen-binding regions, the top of the Y, and the CH and CL regions. That's the heavy and light constant regions for human antibodies. It's all right there in Column 19.

And that, too, was in the 1994 application.

The patent does more than just discuss the structures. It talks about the properties of the antibodies, that they bind to TNF, that they bind to a neutralizing epitope; they compete with A2, that they have high affinity. Those are the types of properties one uses in this vehicle to describe properties with antibodies.

And the patent talks about how to use the antibodies. Remember, it discloses about how to use them for rheumatoid arthritis, for Crohn's disease. It says how you can administer them. It says among the ways you can administer them, IV or subcutaneous. Both are right there in the patent.

Don't be distracted by any discussion about possession of the invention when it comes to the written description requirement. It's not necessary

that our inventors have actually possessed physically human antibodies.

What's necessary is that they have possessed the idea, the invention. And when you look at the patent application, as Dr. Ghrayeb explained it, you will see that we clearly did possess that invention. It couldn't be clearer.

The next requirement is enablement. That 1994 application also has -- must be enabling. And this is an important instruction that you will hear, and I want you to pay attention to this so that when you're considering whether the patent satisfies the enablement requirement, keep in mind that patents are written for persons of skill in the field of the invention, not for you and me. For persons who already have skill in this field. And we've heard that's a high level of skill. They have a Ph.D., several years of experience.

Because of that, the patent does not need to expressly state information that skilled persons would be likely to know or could obtain. You don't have to put volumes of encyclopedias into this application. The people who read it bring to it what they already know from being skilled people in the art. And that's an important thing to keep in mind.

Now, we did disclose things in the patent

application about making human antibodies. You remember, Dr. Ghrayeb pointed to this passage in Column 18 where he cites the Marks 1993 article. You remember that was the article where Dr. Marks disclosed human variable regions to self-antigens like TNF could be made.

And Dr. Ghrayeb said that was -- that was important. That convinced him and his co-inventors that this was technology that could be used to make human antibodies, so they wanted to put it in their patent here.

He also explained Columns 33 and 34, a rather lengthy discussion about making structural analogs of antibodies. And this is what he described as a type of an affinity maturation technology where you can take the antibody that you have and make some specific changes in the amino acid building blocks in the binding region to make it bind even better.

This was also in the 1994 patent application. And they say right here, as I've highlighted: Using this information, one of ordinary skill in the art would know how to make these structural analogs, would know how to make antibodies to bind even better.

But you don't have to look just at what's

in our patent. Look at what's in Abbott's own experience is, as of 1994, because, remember, not everything has to be in the patent.

Remember that Abbott or BASF, its precursor, was looking for technology and they were looking at the technology of CAT, Cambridge Antibody Technology, to work with them on human -- making human antibodies.

You remember that CAT, by 1991 already, was advertising in prestigious science journals that they could use -- they had technology that could be used to take your mouse antibody and make a human antibody. They were telling you it was available.

Dr. Salfeld, when he analyzed CAT's technology in 1992, he wrote a memo. You'll remember seeing that. He said it was proven technology, that they had long-standing experience with their technology, that CAT's library of human genes was very, very large, and it was a proven source of anti-TNF antibodies.

You might remember this slide.

Ms. Mullin went over this with Dr. Marks. It discloses five types of technology that Abbott used to make Humira: Phage display, guided selection, chain shuffling, affinity maturation, and off-rate selection. And there's a question and answer I want to read to you,

because it's very important what Dr. Marks said when she questioned him.

She said: These are the five steps that were used to make Humira, right?

ANSWER: That's correct.

QUESTION: And as we've indicated, every one of these steps was described in articles, patent applications, or other publications that were available to everybody working in the field as of February 4, 1994, right?

ANSWER: That's correct.

Ladies and Gentlemen, the pieces are all there.

This is something even more. You remember, Dr. Marks wrote a chapter in a book on making human antibodies. Now, that chapter didn't publish until 1995, but as Ms. Mullin pointed out, every single reference that he cites predated 1994.

Again, the pieces that you need to make human antibodies, all the techniques were out there in the literature.

One more bit of evidence, that it was not necessary to do undue experimentation to come up with a human antibody. It's Abbott's own experience.

You remember I made this notation on the

timeline slide when I was questioning Dr. Salfeld. They started working with CAT in 1993 on this joint project.

And by 1994, they already had the antibody they called 2SD4. And that was a really good antibody. It had high affinity, as high as our claims require. It was neutralizing, just as our claims require. So within only a year, they had an antibody that was as good as what our claims required.

Now, they went on and they made it even better. They spent another year to make it even better, to make Humira. But I want to remind you of something that Judge Ward told you during Dr. Marks' testimony.

I'm going to read it:

Ladies and Gentlemen, I want to clear up one little matter for you. With respect to this question on enablement, which the witness has been testifying about, I want you to know that enablement -- enablement does not require in a matter to meet the lofty standards for success in the commercial marketplace; that is, in the case of a drug, which we're talking about here, and treatment, it's not required that it be commercially viable or have any particular therapeutic use.

To the extent that either directly or indirectly Dr. Marks' testimony has suggested such,

that's incorrect. And you should disregard that part of the testimony.

So any testimony that you heard about how hard it was to come up with Humira, you're instructed to disregard that.

Ladies and Gentlemen, in 1994, Centocor's patent application clearly provided a written description and enabling disclosure for human antibodies. So Abbott cannot argue that its 1996 Salfeld patent application, or the patent that issued on it, is somehow prior art and renders our claims invalid.

But even if you wanted to take that next step, even if you weren't so sure about our 1994 application, there was not a single witness who sat here, not a single Abbott witness who sat here and went through the Salfeld 1996 patent for you and showed you where it meets every single element in our claim. Not a single witness.

Now, you may hear some argument from Abbott's lawyers about that, but, remember, argument is not evidence. You've been told that. There was no witness discussing that.

So when you get back in the jury room and you're looking at this question of validity, Question No. 2, we ask you to answer no to every single question.

And, again, it's a little counterintuitive. We ask you to read the instructions on this form very, very carefully. A no answer is an answer for Centocor; it's an answer for the patent, because the question is whether Abbott met its burden of proving invalidity. So we ask that you answer no to those questions.

Now, we've discussed infringement. We've told you that the evidence shows that Humira infringes, but there's also an issue about willful infringement. Abbott's infringement has been willful. You remember that Mr. Scodari, our first witness, told you that he continuously told his counterpart, Mr. Dempsey, that Abbott infringed the patent, that Humira infringed the patent. He told him continuously from the time that the claims were first allowed until the lawsuit.

You saw the videotape of Mr. Conway, Abbott's in-house lawyer, and he told you that he knew that there was a chance they might be sued. You heard him talk about an Abbott document that talks about an aggressive risk management strategy that Abbott had for obtaining freedom to operate in this field.

Ladies and Gentlemen, Abbott went into this with their eyes wide open. They knew there was a risk. Their infringement is willful. And when you get

back in the jury room, we ask that you answer Number -- Question No. 3 yes, that Centocor has proven by clear and convincing evidence not only that Humira infringes but that infringement is willful.

Last question for you will be damages.

Now, you remember there was an awful lot of discussion about competition, who competes with what.

And Mr. Bazemore, a Centocor marketing executive that was here, testified for the better part of an hour. And he told you all about the market and what products compete and what patients think what of what products.

You didn't hear a single Abbott witness talk about that. It was only Mr. Bazemore.

And Mr. Gering, Dr. Gering, our damages expert, then spoke told you and he told you about his damages analysis where he considered everything that Mr. Bazemore said. He considered what were patients' preferences, what were the perceptions of the product in the marketplace. He considered the fact that the market had grown. He considered non-infringing substitutes. And he put that altogether to try to understand how many sales Centocor --

THE COURT: You've used 25 minutes.

MS. ELDERKIN: Thank you.

How many sales Centocor would have made. He said only one in five sales would have gone to Centocor. And based on that, he said the lost profits number should be 1 billion, 168 thousand -- 168 million, 466,000. That's the number you might want to write down, Ladies and Gentlemen. Remember, it's a big number and it's got three commas. That's the lost profits.

He said that we also should get a 15-percent royalty on the other sales that Abbott's made where we don't get lost profits. He said it should be 15 percent, because these are highly profitable products and because that's only a little bit more than the industry average of 11.6 for a profitable product like this that are already launched.

His reasonable royalty number is $1 billion, 8 million, 256 thousand. And when you add that up, it's about $2.1 billion.

Ladies and Gentlemen, I'm going to sit down now. We're going to hear from Abbott, and then you're going to -- Mr. Sayles and I will have a chance to respond.

We really appreciate your patience and your attention. Thank you.

THE COURT: Please.

MR. LEE: May it please the Court.

Ladies and Gentlemen of the Jury, let me begin our closing where we ended our opening, by thanking you for your time and attention.

My bet is that you feel like you've been drinking water from a firehose for the last four days, and we know that is what it feels like.

We also know that your jury service has imposed real burdens upon you. And we know that we have thrown a lot of complicated information your way.

But this case is important. It is important to Abbott.

It is important to Dr. Salfeld, who has sat here through the trial.

It is important to the patients who have taken Humira, the tens of thousands of patients who have taken Humira since it went on the market and have been benefited from its advance.

And it is important to every single company who competes in the marketplace on the basis of invention, innovation, price, quantity, and quality.

Now, in our opening statement a week ago, we asked you this question. We asked you whether Centocor really was here to prove to you that we infringed a patent, patent claims, and that they are entitled to billions of dollars in damages, or whether,

in fact, what was really going on was that Centocor was here to make up in the courtroom for their inability to compete in the marketplace.

Now is the time to answer that question. Now is the time to bring what His Honor said is your collective wisdom and your collective good judgment to bear on the questions before you.

Now, this case, to be sure, involves two very sophisticated companies, two very sophisticated companies that have brought important drugs to the marketplace. Both companies have helped thousands of people. And that's a good thing.

But you now have learned, and Ms. Elderkin conceded, that the companies went about it completely differently. They took different paths and they went in different directions, and they came up with different products.

Centocor started with a mouse antibody, and I put up the chronology so you can follow, because the chronology answers many of the questions His Honor is going to pose to you.

Centocor started with a mouse antibody but then decided that they would need to improve on it. They would have to make it more human in order for it to work with patients.

Now, Mr. Scodari, someone who was a former president of their pharmaceutical division, told you that at the time Centocor was in dire straits. They had tried to come up with an antibody in the early '80s. It had failed. They were on the brink of failure. So what did they do?

Well, Dr. Knight, one of the inventors, testified they decided to develop a TNF -- TNF-alpha antibody, but they decided to pursue not a fully human antibody but a chimeric antibody.

Why?

It was more predictable, and it was simpler.

Now their decision has paid off. They developed Remicade. It is a fine product. It has been successful. They have made billions of dollars. They have gotten patents for it.

No one is trying to take that away from them. You haven't heard a word about our trying to take away claims that cover chimeric antibodies, patents that cover chimeric antibodies, or their billions and billions of dollars of sales.

All you've heard about is we're content to compete with Remicade in the marketplace.

But you've also heard that Remicade has

limitations. It's not a fully human antibody. It's about 25 percent mouse.

Remicade has to be infused in a doctor's office with that rig that's over in the corner that I asked Mr. Bazemore about. It has to be administered with a nurse present and a crash cart present, and that takes time and effort and expense.

For rheumatoid arthritis, Remicade requires co-administration with Methotrexate, that very, very powerful anticancer drug.

But you now know, looking at the top half of this timeline, that Centocor wasn't the only company working on an anti-TNF antibody. Abbott was as well. Abbott had a completely independent project.

Ask yourselves: Did you hear a shred of evidence that Abbott copied Remicade?

Did you hear a shred of evidence that Abbott had Remicade in its hands when it developed its antibody?

No. Instead what you heard is that in 1986, an Abbott scientist, Dr. Moller, developed a mouse antibody to TNF, long before Centocor had its first antibody.

But like Centocor, Abbott said we know we got to make something better. We've got to make

something better.

What did they decide to do?

Well, you heard from Dr. Salfeld about what he and his team of scientists wanted to do. And I'm going to put some of the testimony you actually heard on the screen. And I'm going to show you that testimony against the instructions as we move forward.

And what did Dr. Salfeld tell you he wanted to do? We wanted to do something that had never been done before.

Now, it took several years for Dr. Salfeld and his team to be successful. There were failures before there were successes. There was hard work and investment, too.

Now, let me say parenthetically here for a second. Ms. Elderkin mentioned the Judge's instruction that having to have a commercially viable or a therapeutic antibody wasn't the standard. He never said that the work that was required to develop a fully human antibody in the lab wasn't relevant.

Now, in the summer of 1995, you know that antibody -- that Abbott was successful. On New Year's Eve 2002, Humira received FDA approval, and it's now been used to treat thousands of patients.

Now, Humira has advantages over Remicade.

It is fully human. It has no mouse parts. It can be injected by the patient at home. It doesn't have to be used with Methotrexate.

And we have seen -- no matter what the FDA says or either of us can say, we have seen from Centocor's own documents -- and this is Plaintiffs' Exhibit 261.

We've seen from their own documents that they say that physicians and patients view Humira as significantly safer than Remicade.

Does that matter?

Well, sure. What patients and doctors think counts. That's why Dr. Scodari described Humira, on my cross-examination, as a dramatic innovation. That is why Abbott's Humira won the Galien Prize, the Nobel Prize, for pharmaceuticals. That is why one of the people on the committee, who wanted to give this award to Abbott, was Dr. Vilcek, one of their inventors.

Now, you also know now that Abbott applied for an application on Humira in February of 1996, and that patent issued in 2000.

Think about that, Ladies and Gentlemen. That is six years before Centocor applied for the patent in this case, and the patent issued two years before Centocor applied for the patent in this case.

You also know that it wasn't until a year later, a year after Abbott had filed for its patent, that Centocor even started to develop this fully human antibody.

Ask yourselves -- Ms. Elderkin is here in Court telling you that they had it in 1984. They had the idea; they knew how to do it; it was all out there. They didn't start until 1997, and they weren't successful until 1998.

Now, despite this chronology, which is undisputed, Centocor is trying to take credit for the invention of the idea of a fully human antibody. Well, you met Dr. Salfeld, and you heard his testimony. He wouldn't even take credit for this invention himself. It was always my team, my colleagues, my friends.

But now Centocor wants to take credit for that invention. Use your common sense and collective wisdom. Does that make sense?

Ask yourself this: Dr. Salfeld came to you, got up on that stand, and subjected himself to the crucible of cross-examination. And then he sat there with you through the rest of the trial to tell you about what he had done.

Centocor called one inventor of its six, Dr. Ghrayeb, who didn't even do the work reflected in

the patents. And he came and he left, and the other five never showed up.

If you were an inventor on a patent that you thought entitled someone to $2 billion and you knew the validity was being challenged, do you think you would show up in Court and defend it?

The only testimony you heard from them, which I'll come to in a minute, we showed you.

Now, a patent is a very, very powerful thing. If it's valid, then it entitles you to something. But a patent has limits. A patent only entitles someone to recover damages if you have a valid invention to prove infringe. You have to have had the invention. It's not enough to wish that you had it or to hope you had it.

And, in fact, you're going to hear from His Honor's instructions that a wish and a plan to have something is not enough. Wishing it and saying it don't make it so.

Now, we suggest that the timeline would answer some very important questions and it has. If you look at the timeline and the development of the different products, you will see that a mouse antibody is different from a chimeric antibody is different from a human antibody.

Dr. Marks told you, based upon 20 years in the field, that a fully human antibody has become the Holy Grail, and it's become the Holy Grail for reasons that would be fully understandable to all of us who are not scientists, including you and me.

Now, Centocor has spent a lot of time telling you don't worry, they're not different. Well, you know from their own documents that patients and doctors think that they are.

But more importantly, let's look at what Centocor did. If they are really not different, why did Centocor, in 1997, decide to develop a fully human antibody?

Why did they decide to bring a fully human antibody to market in 2009? Why?

Because they're different, and they know it.

Now, the second thing the chronology demonstrates is this: Centocor has suggested to you that we're the people who identified TNF-alpha as a therapeutic target. Well, you know from His Honor's instructions that therapeutic has nothing to do with the case.

But more importantly, you know that Abbott had identified TNF as the target. Abbott had

developed the antibody way back in 1996. And you know from Dr. Kamen's testimony, which you saw on the video, that Abbott was already working on a fully human antibody before public information about Remicade became available.

Now, developing -- the third thing the chronology shows is developing a human antibody was really hard work. You know that Centocor tried to do it and failed. You know that when Abbott started to do it, it worked with Dr. Pablo Casali at New York University, one of the great scientists, and they failed.

You know that when Dr. Marks tried to do it in this period, one of the leading phage display people in the world, he was unsuccessful. Only by combining, only by combining the cutting-edge technology of phage display were Dr. Salfeld and his colleagues able to create Humira.

You saw him testify. You ask yourselves whether that chart that Ms. Mullin did where the things were out there, created a recipe that any scientist in the world could follow.

You ask yourself, if that's all true, how come Centocor didn't get started for another three or four years?

Now, what are the questions the Court is

going to ask you? There are going to be four, and they are going to be on validity, which is Question 2; infringement, willfulness, and damages.

I'm going to now use the remaining portion of my time to address validity. Mr. Beck is going to talk to you about Questions 1 and 3 and 4.

Now, let's turn to validity. Our judicial system, as I said in my opening, makes you a really critical part of this process. The reason that we can come before you, before a Judge that's been appointed by a President of the United States, is because you are the first people who get to hear the whole story. You are the first people who get to hear Abbott's side of the story. The Patent Office did not, could not.

And all of the information I'm going to go through in the next 15 minutes, for the most part, 99 percent of it was not available to the Patent Office. And if it had been, I would suggest to you there would have been a different decision at the Patent Office. But that's not what matters. What matters is that you do get to hear it. You do get to decide it. We do get an opportunity to tell you our side of the story.

Now, let's be very clear. There are four patent claims at issue in this case. 2, 3, 14, and 15.

Here is the really surprising thing: Those claims don't cover a chimeric antibody. Dr. Adams admitted that. They don't cover cA2. They only cover, so it says, Centocor, a fully human antibody.

Now, let's look at the verdict form on the issue of validity, and I'm going to put Question 2 on the screen.

Now, as you may recall from Dr. Marks' testimony, Abbott has three different reasons why this patent is invalid. Three different reasons. And they're not excuses. These are requirements that Centocor failed to comply with, requirements of our patent law.

And the first -- they are enablement, written description, and prior art. They are all independent. But to be clear, we are asking you to find the claims invalid for each of these independent reasons.

Second, all of the claims rise and fall together. There have been no independent arguments made to you distinguishing Claims 2, 3, 14, and 15, for instance, on any of these bases.

Now, let's put up the '775 patent on the screen.

There is no dispute the application was

filed in July -- on July 18th, 2002. But that's not the key date for this patent, as Ms. Elderkin has just told you. Why? Because we were out there in 1996.

So what did they say? Well, we had it back in 1994. We had the invention in February 1994.

Now, His Honor is going to instruct you, for that to be true, Centocor has to -- Centocor was required to enable and have an adequate written description as of February 1994.

And the overwhelming evidence is going to demonstrate that those weren't true. The simple fact is that if you focus on February 1994, Centocor hadn't done it, didn't have the idea, didn't describe how to do it. It didn't do anything.

It may today wish it had, but you're going to see from the testimony of Dr. Ghrayeb that they didn't even intend it back then.

So let me look at -- let's look at the enablement question. This is the first question. We do have the burden of demonstrating this by clear and convincing evidence, and we believe that we have.

Now, Judge Ward is going to give you instructions on written description, and I'm going to put up a portion of what he's going to tell you. And these are critically important.

The first is that the written description requirement set forth in the patent must disclose sufficient information to enable one of skill in the art in the field of the invention to make and use the claimed invention. The full scope of the invention must be enabled.

Do you remember the proverb I talked about in my opening? It's not enough to give a man a fish so he can eat for a day. You have to teach him how to fish? Well, that's what this is about.

Let's turn to the next page of His Honor's instructions.

A written description is enabling so long as undue experimentation is not needed to make or use the invention. And what you'll hear when you listen to the Judge is what follows.

The next sentence has the eight Wands factors. Do you remember Dr. Marks took you through those eight factors -- they were grouped in groups of four -- and said here's why the patent's not enabled?

The Judge is going to explicitly instruct you, as a matter of law, to apply those. Dr. Marks was the only witness who testified about those. Dr. Adams didn't say a word.

Now, let's talk about what the enablement

question -- the proof that would answer that.

Dr. Marks testified clearly and without contradiction that none of the applications, from '94 all the way leading to the '775 patent, were enabled. None of them.

He walked through the eight Wands factors and showed you why they were not enabled. And the most striking thing is, Centocor did not offer you any witness to contradict this.

Dr. Adams, who had never worked with anti-TNF-alpha antibodies, never in his life, didn't utter a single word to contradict Dr. Marks on this issue. Why not? He could not contradict him. He would not, because he knew what Dr. Marks was saying was right.

That alone is sufficient to satisfy Abbott's burden of proof. But in addition to Dr. Marks' testimony on this have-you-taught-someone-to-fish issue, let's look at some other evidence before you.

The '775 patent has 28 examples. They're in your notebook. They're hard to understand, but I can tell you this: There's not a single one that describes a fully human antibody.

There's not a single one that tells you how to make a fully human antibody. There's not a

single one that tells you how to use a fully human antibody. There is no indication that they had on possession of the idea.

We know that Dr. Knight, an inventor on the '775 patent, who we had to present to you, testified that if you're going to make a fully human antibody and you had the '775 application, quote, so do you think inventive steps would be required to actually -- in actually doing that?

I think so.

Well, how can it be that they taught people how to fish in 1994, but there would be an invention required in order for people to do so?

Now, you also know this from Dr. Ghrayeb, who did come to testify. To get its patent, Centocor told the Patent Office that there were problems with fully human antibodies. They told them there were problems.

And I asked Dr. Ghrayeb: So you told them there were problems. Did you offer them any solutions?

And he said -- and here's the question and the answer.

QUESTION: You don't describe any solutions to the problems, do you?

ANSWER: Not to my knowledge, no.

So, Ladies and Gentlemen, use your common sense. If they had the invention in February 1994, what are they doing telling the Patent Office that there are problems, and what are they doing telling the Patent Office about problems as to which there is no solution?

Now, Ms. Mullin did put up that chart and went through the steps that Dr. Salfeld and his team followed to make their invention. You heard Dr. Salfeld testify that as soon as ECQ had 1, 2, 3, 4, 5 -- does it seem as if ECQ is going to the prior art and picking out this and this and this? It's not.

You know three key things: Except for Dr. Marks' paper, none of this was mentioned in the patent.

You also know that as to the things that were mentioned, Dr. Marks testified unequivocally, unequivocally, that it would require undue experimentation and hard work to do it.

You also know this: When Centocor got started in 1997, did they go back and follow this recipe that they claim was out there in 1994 for anybody in the field? No. Their own conduct demonstrates that what they're telling you today is wrong.

Now, you may remember that I did ask

several witnesses whether they had ever made an anti-TNF antibody at any time. I know none of you have; neither have I, okay? Neither has Ms. Elderkin. But we're talking about what people would have done back in February of 1994.

If the question was, what would have been required to make a cell phone back in 1994, wouldn't you want to hear from someone who had tried to make a cell phone?

Well, that's why that list of questions is important. And let me show you a list of the witnesses who were called to testify.

Here is a list of witnesses who Centocor called to testify. Not one of them, not even Dr. Ghrayeb testified that they had made an anti-TNF-alpha antibody, not one.

If you're asking for $2.2 billion because you invented a fully human antibody, don't you think you would bring someone who had done it? Don't you think you would bring someone who said, in 1994, I had the idea?

Now, Abbott, on the other hand, offered you testimony from several scientists. Every single one of them, including the inventors, including the inventors of the '775 patent, who we offered, had made a

fully human antibody or a murine antibody or a chimeric antibody, and every single one of them, their testimony supported Abbott's position, not Centocor.

There is a reason these folks were brought to you by video by us. It's because their testimony supports Abbott's position. It's testimony the Patent Office never had and never could have had.

Now, Abbott -- Centocor has criticized Abbott for not bringing marketing people. I guess that means folks like Mr. Scodari, who you'll recall never had read the patent; Mr. Bazemore, who didn't arrive till 2002; or Mr. Dow, the patent lawyer who actually filed the 2002 patent application.

Well, this case is about science. It's about scientists. It's about invention. It's not about marketing. It's not about lawyers giving notice to each other. It's about science.

And look at the lineup. Bring your common sense and good judgment to bear on who brought you people who knew what was going on.

Now, let me move to written description, the second issue. We do have the burden of proving this by clear and convincing evidence, and we have.

Actually, let me go back and show you one demonstrative on the question of the burden of proof.

Remember the Judge talked to you about the scales of justice? We didn't put Lady Justice up there, because it's a little too complicated.

Here is the proof: Marks, Le, Vilcek, Knight, Salfeld, Casali. And on the other side, Dr. Ghrayeb.

See this empty chair? I put that empty chair there because that's the chair that Dr. Adams was sitting in. He sat this one out. He gave you no evidence on this issue.

Now let's go to written description, and you're going to find the same thing. And I want to go to the Judge's instruction.

You heard Ms. Elderkin, just a minute ago, say that it doesn't matter when the inventors were in possession of the invention.

Here's what the Judge is going to charge you with: The purpose of this written description requirement is to make sure that the patent describes the technology it seeks to claim as an invention and to demonstrate that the inventor was in possession of the invention at the time the application for the patent was filed, even though the claims may have been changed or new claims added during the prosecution.

Now let's turn to that second paragraph.

THE COURT: You've used 25 minutes.

MR. LEE: Okay. Thank you, Your Honor. An adequate written description describes -- requires a precise definition, such as by structure, formula, chemical name, or physical properties, not a mere wish or plan for obtaining the claimed invention. Not a mere wish or a plan.

Now, you don't have to have physical possession, but you have to have possession of the idea. And as a matter of common sense, if you have the thing, it's much more likely you have the idea. If you can't make the thing, it's a lot less likely you have the idea.

So let's look at what the witnesses said. First, there was Dr. Le, their inventor, who we called. We asked him the question, quote, And you never had possession of a fully human antibody to TNF, that's correct? That's correct?

ANSWER: That's correct.

So consider the Judge's charge and consider this testimony.

And what did Dr. Ghrayeb tell you when he was live here? He told you that it was never their intention to make a human antibody. Never their intention to make a human antibody.

So how does it happen, if you never had the intention, that you never do it, you never tell anybody how to do it, you don't get started for five years, and you want a jury to award $2.2 billion in damages against someone because you now say you had the idea in 1994?

It wasn't just Dr. Ghrayeb. Remember the 1991 application. Remember the problems they described with a fully human antibody.

It wasn't just one witness, Dr. Ghrayeb, who said they hadn't overcome the problems. On the written description issue, let's look at what Dr. Vilcek said.

No, I did not come up with a way to -- ways to overcome these obstacles.

In light of these problems, they identified the problems; they identified no solutions.

Now, for sure, Ms. Elderkin took Dr. Ghrayeb through portions of the specification and said, does it say this; does it say that?

Were human antibodies there?

Yes.

Did anybody get on the stand and tell you that was enough to disclose that one of ordinary skill in the art had the invention? No.

Let me show you again a slide demonstrating the proof on both sides.

Dr. Marks, the original application, Dr. Vilcek, Dr. Le, Dr. Knight.

On the other side, just Dr. Ghrayeb, who gave you no opinions and then came and left.

And in the chair, Dr. Adams. He sat this one out, too. He said not a word, not a word about written description.

Now, Ms. Elderkin put up the phrase human antibodies in the summary. The word is there. Patent lawyers put it in in 2002.

But you now know from the Judge's -- Your Honor's instructions, that's not enough. You have to have more than that, more than a wish or a plan.

Now, lastly, before I yield the floor to Mr. Beck, let me talk about anticipation. That's the third independent reason these claims are invalid.

We do have the burden of proving it by clear and convincing evidence. The answer to each of these questions, we suggest, should be yes.

Now, you're going to hear, when the Judge charges you, about two pieces of prior art. One is the Salfeld patent. That's the patent at issue. It was filed for in 1996, was issued in 2000, two years before

the 2002 application.

Centocor doesn't even claim that that patent -- that their patent application fell on that filing date. How could they? What they say is, we're going to go back to 1994.

Now, we've talked about all the problems with 1994, but they got one other problem. And that one other problem is that someone had done it before, the Adair patent, clearly and convincingly.

And let me say these things to you:

First, on these issues that Ms. Elderkin went into, IgG1, IgG4, baboon, human, just take a look at Pages 9, 22, 27, and 361. They will tell you exactly the opposite of what she just said.

But you don't need to agonize over them, because when I asked Dr. Adams, Did you suggest that anything was missing from Adair, other than competitive innovation, he said no. This is an 11th hour lawyer's effort to find differences.

And what is interesting, all of a sudden, baboon and human are really different for the prior art, but mouse and human aren't so different when you compare our products.

Now, the one place we disagree on is the competitive inhibition. The PTO did not have the test

results Dr. Marks had. He sat up there; he told you he reviewed the protocol; he reviewed the test results; they were reliable.

Most importantly, they were run in the right direction. Did you ever hear Ms. Elderkin suggest they weren't run in the right direction?

And he said that the fact the sample was old, the fact the sample was old only was an indication that the test results were more reliable.

But you don't have to wonder whether those test results showed competitive inhibition, because on cross-examination -- this is one issue that Dr. Adams did get on the stand and testify about -- I asked him this question:

QUESTION: You saw the data points you've described that showed some competition, correct?

ANSWER: Correct.

So he concedes that the test shows what Dr. Adams says it showed.

Now, did Dr. Adams prepare his own test results? No.

We gave him a sample of CDP571. What did he do with it? He kept it in a refrigerator, and then he put it in his pocket, and he brought it to Court.

Now, Ladies and Gentlemen, ask yourself

this: If you were suing someone for $2.2 billion, if somebody had given you a sample that said, we've tested it, and it shows that it was out there before, and it makes your patent valid, would you run around with it in your pocket?

Or would you test it -- would you test it for a miniscule amount of dollars? Why wouldn't you test it? Well, the inference is because you're concerned about the result.

One last point to be clear, and then I'll yield the floor to my colleague. All this business about the Adair testing has nothing to do with written description or enablement. It only relates to anticipation.

It has nothing to do with whether, in 1994, they had the invention; they taught the invention; one of ordinary skill would have known how to make the invention.

With that, you'll hear from me no more, and I would yield the floor to Mr. Beck.

MR. BECK: May it please the Court.

THE COURT: Mr. Beck.

MR. BECK: Ladies and Gentlemen, when you put on those little white badges, you became a very important part of our history. You became a very

important part of our heritage. And you are the last in a long line of people who have sat in a jury box very similar to the one that you're sitting in today.

And the reason for that is because the people that formed our country over 275 years ago wanted people like you to help us resolve disputes. And in Texas, not quite as long, but over 150 years ago, the people that formed our state wanted people like you to help us resolve disputes.

Judge Ward is going to tell you, I expect, in a few minutes, that you are the exclusive judges of the facts. You are going to be the exclusive determiners as to what is credible or not.

And the Judge is going to use the word credibility. The way I look at the word credibility, it means, who do you believe? Who do you believe from all of these witnesses in this case?

You can reject every witness, if you want; you can take bits and pieces of witnesses' testimony, because you believe some parts and not others. And that's your exclusive right, and nobody can take that away from you.

Now, we brought you a number of witnesses, but two of them I want to mention to you. We brought you Dr. Salfeld, who is an absolutely brilliant

scientist. I thank goodness he decided to be a scientist and not a farmer. But I tell you one thing, if he had been a farmer, he would have been a darned good farmer.

And the question that you've got to ask yourself when you're resolving this credibility issue is, do you believe Dr. Salfeld?

Because to rule for them, you've got to reject, basically, what Dr. Salfeld told you, all of the things that Mr. Lee just went through, how hard it was, how it took four to four and a half years to come up with this invention that he came up with and he wouldn't even take credit for it.

I mean, you saw how modest he was. I've never met a person who accomplished so much but yet was so modest. You've got to decide whether you believe him or not.

And we brought you Dr. Marks, another brilliant scientist. But, you know, Dr. Marks was a little bit different than others, because he's a medical doctor as well, and he sees patients. He not only works in the laboratory, but he works in the real world where you and I live.

And his testimony, I would respectfully submit to you, should carry a little bit more weight,

because he's got a foot in both worlds: The scientific theoretical world and the real world in which we all live.

You've got to decide whether you believe him when he said there's no infringement here. And he gave you the reasons why there was no infringement. That's what the Judge means when he says you determine the credibility of the witnesses and you determine who you're going to believe.

Now, I want to go back to Question 1, which is the infringement issue. The first question the Judge asked you is whether or not our client, Abbott, infringes the '775 patent.

Well, as the Judge tells you, they've got the burden. Centocor has the burden of proof. If they do not satisfy their burden, then basically the Court is instructing you, you've got to find for Abbott in the case.

If you believe that the evidence is absolutely even; I don't know; I just -- I can't make a decision; it's even; well, if it's even, under the instructions and the burden of proof, then you must find for Abbott in this case.

Now, with respect to infringement, you've got -- for there to be infringement in this case, Ladies

and Gentlemen, they must be able to prove by a preponderance of the evidence that Humira competitively inhibits the binding of A2 to TNF-alpha.

How do you prove that? You prove it by testing. Everybody agrees you prove it by testing. Well, what evidence of testing did Centocor present in this case?

They first asked one of their long-time employees, Ms. Tam, to run some tests. And you remember she had to run them twice, because there was some problems or mistakes that were made the first time that she ran the tests.

She's on and off the witness stand pretty quickly, and then they bring in Dr. Adams, who is going to explain to you what the significance was of Ms. Tam's the test. Well, Ms. Tam's tests were done more than a year before Dr. Adams was even hired.

Dr. Adams, as you well know, is fully capable of running these tests himself. He is fully aware that there are independent laboratories out there that can run these tests.

Well, Dr. Adams, did you run such a test?

No.

Well, did you get an independent lab to run these tests so we can prove -- so you can absolutely

establish this competitive binding?

No, didn't do that either. Didn't do that either.

So there has to be testing. He didn't run the tests, didn't get anybody else to run the tests, but somehow they're coming in and saying that you should somehow just kind of on a leap of faith believe that there was competitive binding.

But ask yourself, if he didn't run the tests, and he could have, and an independent lab could run the tests, and we know they could have, why do you suppose he didn't do it? Why do you suppose he didn't get an independent lab to do it?

Well, as Dr. Marks testified, with respect to the tests that Centocor actually did run, he says direction matters. The way you run the test, the direction you run them really matters.

And the evidence is undisputed that neither Ms. Tam nor Dr. Adams nor anyone else on behalf of Centocor ever ran a test in the right direction to establish and prove by a preponderance of the evidence that there was this competitive inhibition and therefore infringement.

Well, why does direction matter? You remember Dr. Marks showed you those animations? He

showed you two animations that shows you what happens when antibodies compete.

And Dr. Marks specifically showed that an antibody might compete in one direction with another antibody but not in the other direction.

And he also told you about that 1990, Dr. Moller's publication that related to Abbott's mouse antibody A2. This is his publication.

Well, let's show what Dr. Moller said back in 1990 about this competitive inhibition. And you see that MAK195, which is the mouse antibody that he was working with, does not compete with mAB 114, but mAB 114 does compete with MAK195.

THE COURT: Five minutes.

MR. BECK: In other words, the directions, the directions do matter in this case.

Now, the testimony is undisputed that Centocor could have run this extra test for what Dr. Adams called a miniscule amount, but he never did.

Why do you suppose that is? If they were planning on suing our client for over $2 billion, don't you think they would have spent some thousands of dollars to run the proper test to show what they were alleging in the case?

They have Dr. Moller's article. They had

that graph. Do you suppose that they didn't do it, Ladies and Gentlemen, because they were a little bit afraid of what that test might show?

Do you believe that they suspected, after reading Dr. Moller's article, that if they run the test, it's not going to show what they want it to show?

So what do they do? They say, well, okay. We're going to go ahead and run some tests using cA2. Not A2, cA2.

If we can put the claims up, please.

The problem with that is, is their patent refers to A2. It talks about competitively inhibits binding of A2.

And what is particularly unfair about what they're trying to do, Ladies and Gentlemen, is the fact that cA2 was initially mentioned in their patent application, and when the Patent Office rejected their application, they struck cA2.

So, basically, what they're trying to do is to use a test with something that was dropped out of their patent application and therefore their patent.

Dr. Adams was asked about that, and it was like a deer in the headlights when this was called to his attention. And he finally said, well, you know, I don't remember whether I considered that or not.

Well, today they're telling you, well, this is just paperwork. Well, Ladies and Gentlemen, the paperwork happens to be their patent application, and their paperwork happens to be the patent, which is what the basis of this whole lawsuit is about here.

Now let me turn to willful infringement.

Obviously, if there's no infringement, there can be no willful infringement.

Judge Ward defines willful infringement as reckless disregard, among other things. To me, that means overwhelming evidence by a clear and convincing -- clear and convincing means to me overwhelming evidence. Is there overwhelming evidence that somehow we acted recklessly?

Well, is it reckless to defend yourself when you believe you're right?

Is it reckless to defend yourself when the other side says, Wait a minute; we've got tests that show you, Abbott, you're wrong, and we say, well, why don't you show us the test and let's look at them?

Is it reckless when they refuse to do it, and we say, well, look, we're going to defend ourselves; we don't believe you're right; we believe your patent is invalid?

That's not reckless conduct, Ladies and

Gentlemen. That's reasonable conduct. It's the reasonable conduct of a company that is not going to give in to something that they do not believe is right.

Now, let me turn to damages real fast.

These two damage experts were like two ships passing in the night. And you may be thinking, God, is there anything these two agree upon? And the answer is yes.

They agreed -- they agreed that if there's no infringement, the answer is zero to damages. And they also agree that if there's -- if the patent is invalid, there are no damages in this case.

And, Ladies and Gentlemen, we respectfully submit that the answer to the damage issue is zero.

Now, this is the last time I get to say anything, and it's killing me, but it's the last time I get to say anything.

When you-all go back in the jury room, you're going to know they get up and get a chance to say something after this.

When you go back and the questions they raise, ask yourselves, what would Beck or Lee have said if they had a couple of more minutes to respond to that? Ask yourself what we would have responded had we had the

opportunity, under our system, to do that.

These people compete. No question about it. They've got a good product. They're making billions of dollars. Our client makes a good product, and they're doing pretty well, too.

THE COURT: One minute.

MR. BECK: Let these people go back to the marketplace and compete on price and product and innovation. If they do that, we all benefit.

Thank you.

MS. ELDERKIN: May I have a second, Your Honor, to make sure my technology is right?

THE COURT: Sure.

COURTROOM DEPUTY: The other way. That's it.

MS. ELDERKIN: I just wanted to make sure I can do that.

Thank you very much.

Ladies and Gentlemen, Mr. Beck talked about credibility, and credibility is very important. I want to point out a few things that Mr. Lee said and what he didn't say.

He said, why wasn't Dr. Ghrayeb here? If he cared so much, why wasn't he here in the courtroom after he testified?

Mr. Lee knows that Mr. Ghrayeb hasn't been excused by the Court yet. He wasn't permitted to sit here and listen to the testimony. That's why he wasn't here.

Mr. Lee put up a question and answer on the screen from Dr. Ghrayeb's testimony. The question said something about it not being his intention to make a human antibody.

What he didn't show you was the testimony a few lines later when I asked him: I want to make sure the jury understands. You said it wasn't your intention to make a human antibody. Are you referring to what you were doing in the lab then?

ANSWER: Yes.

QUESTION: Are you saying that was not part of your invention?

ANSWER: No, I'm not saying that.

He was talking about what he was focusing on -- focusing in at the lab at the time with the limited resources of the company. They were focusing on making a human antibody -- I mean, a chimeric antibody.

So, of course, he wasn't intending to make a human antibody at that time.

Mr. -- Mr. Lee also put up some testimony

from Dr. Adams having to do with the competition testing on Adair. He put up testimony and he said -- where Dr. Adams said, there are a couple of points that definitely suggest competition in the second assay. And he did say that.

What Mr. Lee didn't show you was the very next question and answer where he was -- where Dr. Adams was asked: So then wouldn't you conclude from those that there's competition in the assay?

And he answered: No.

Because at those points in the assay, at the points where the assay suggest competition, the control antibody that was used in the assays was giving results that suggested that the assay was unreliable at that point.

So keep in mind credibility when you're back there deliberating, Ladies and Gentlemen.

A few other things I want to point to before Mr. Sayles gets up. The instruction on written description, I told you they don't have to have physical possession. It's possession of the idea.

When you listen to the instructions, you're not going to hear a word about any necessity for them having physical possession of the invention.

Let me just point to one demonstrative

that Mr. Lee used. Let me point to a few things on this.

He was talking about testimony from different witnesses on whether they had made human antibodies. Well, it's no surprise that Dr. Le and Dr. Vilcek said they hadn't made human antibodies. If you remember Dr. Ghrayeb said, their role in this invention was to make the mouse antibodies.

Dr. Knight, you remember Dr. Ghrayeb said Dr. Knight worked for him. He took instructions from Dr. Ghrayeb, and Dr. Ghrayeb didn't put him on a project to make human antibodies. They were focusing on making cA2.

Dr. Marks, remember all his testimony about all his publications in the field that all put together the pieces for making human antibodies.

Now, they say, where was their expert? Why didn't we have an expert opine on this, give you an opinion?

You didn't need to hear another expert opinion. Dr. Marks, who's gotten $2.7 million from Abbott for sales of Humira, do you think we needed to put another expert on that?

You have all the facts that you heard, but there are some additional facts that aren't shown on

this slide, one is the Patent Office.

The Patent Office allowed these claims, and they did so in full knowledge of what Centocor was claiming that they covered.

This is from the prosecution history for the '775 patent. Before it issued, Centocor made sure that the Examiner understood that the claims in this case embodied commercial products on the market such as Remicade and Humira.

The Patent Office knew that these claims -- that Centocor certainly intended that they were going to cover human antibodies like Humira, and the Patent Office allowed the claims.

But you don't have to listen to us again on what was available in 2004 for making human antibodies. The allusive Zehra Kaymakcalan, whose name you've heard a lot, this is an Abbott document that she wrote in 2007 where she was talking about the discovery of Humira.

And she said what was available, what were the techniques for making human antibodies in 1993, all the ones our witnesses talked about, including using phage display.

There are a lot of things that aren't on this demonstration, a lot of evidence that points to the

fact that there was an enabling disclosure and a written description of human antibodies in our patent application in 1994, and this issued by the Patent Office.

I'm going to turn it over now to Mr. Sayles.

MR. SAYLES: May it please the Court, Counsel, Ladies and Gentlemen of the Jury.

Here comes the caboose. I have just a few minutes remaining, and I want to use a proverb that's different from the one that Mr. Lee has used several times.

The Old Testament prophet Isaiah said: Come, let us reason together, and that's what I want to do with you.

You were asked a minute ago by Mr. Beck to ask yourself in the jury room, what would Mr. Beck say, what would Mr. Lee say to these various arguments that are raised.

Ladies and Gentlemen, that is not what you should do. That is not the test.

What you should do in the jury room is to be guided by the evidence. The evidence answers the questions here, not these excellent lawyers.

I could answer the questions, but not

because I'm such a clever lawyer, but because they're in the evidence. You should use the Judge's instructions as your anchor when you go into the jury room.

And Judge Ward told you at the beginning of this case that you have the most important tool to take with you to the jury room, and that's your good common sense and experience.

When he said that, I began to think about it, and I added up your ages, and there's over 500 years of life experience and common sense right there in that jury box. And we'll rely on that and the Judge's instructions and the evidence to answer these questions.

The first issue I want to address for you is this -- the issue, Question No. 1, of infringement.

Would you give me the Judge's Instruction No. 1, please?

As that's coming up here, I want to tell you, there are a couple of things that have been mentioned that are not consistent with the Court's charge.

One is, Mr. Lee continued to compare the Humira product, the accused product, to Remicade. When you read these instructions, you will see that you're to compare the accused product to the claims in the patent, not to the accused product. Do not be

misled.

In addition, the Court instructs you that the fact that Abbott obtained its own patents on Humira is not relevant to the issue of infringement.

Now, I want to go to this question, which I submit to you this is the excuses, the defenses that Mr. Lee talked about. And I'm going to put this up here, because having been down this path a few times, I've learned that this question is tricky a little bit to answer because of the way it's phrased.

The question here is not one of validity, but it is one of invalidity.

Do you find that Abbott has proven by clear and convincing evidence that the claims are invalid for the following reasons?

Now, the reason it's written that way is, right now, this -- these claims in this suit are valid. They are presumed valid. That's in the Judge's instruction. And it's because the Patent & Trademark Office has experienced and qualified examiners who look at these patents before they issue and look at these elements of enablement, written description, and prior art.

Mr. Lee would have you believe that the Patent & Trademark Office made not one, two but four

mistakes. They have two items of prior art that they refer to here, that the Patent & Trademark Office made four mistakes in issuing this patent, to overcome the presumption of validity.

The answer to this question is no. No means the claims are not invalid. You see it's a little bit of a double negative, but the answer is no to all of these.

Now, let me move to the issue of willfulness, and here I want to invoke your common sense for a moment.

You heard throughout this trial from the very beginning that Abbott came in here and said that they didn't have any notice about this patent. That's their beginning position.

Well, let's take a look at what Joe Scodari said, that he testified to.

No. 8, please, Joe.

Joe Scodari said, when he was asked, and there was lots of testimony about this, that he had discussions with his counterpart, Mr. Dempsey. We're talking about high-level executives, as you'll recall, discussing this with one another, and the people that worked with them, Mr. Heyman, on behalf of Centocor, Mr. Poulos, on behalf of Abbott, were discussing this

very issue about the allowed patent claims before the patent actually issued in July.

So not only did they have notice of the patent, they had notice of the patent and discussion of the patent prior to it even issuing.

What could be better?

But to come into Court and claim they don't have notice of the patent and notice that Centocor said that they infringed?

Now, remember, Mr. Scodari had discussions with his counterpart, Mr. Dempsey, for a period of 15 or 16 months, before, at, and after the issuance of the patent.

And if that weren't enough, Mr. Conway, Lawyer Conway -- No. 6, please.

Lawyer Conway for Abbott got involved, and he asked the scientist, Zehra Kaymakcalan, as you've heard about, for some technical information. And he got it the very next day.

Let's look at No. 4.

He got the information he needed. Now, how did he get the information he needed to see if there was infringement of these claims one day later?

The answer is right here on this exhibit that it already had been done back in July. This is

dated July 1st, 2005. And you'll recall that these discussions were in December of 2005.

And in this report, which is in evidence, you'll see at the time that Abbott was being charged with infringement, and they did testing and they asked their scientists for tests, they did tests on cA2, not A2; cA2.

It was good enough for them then; it ought to be good enough for them in Court. They test the same way. You heard the evidence of that.

Then if that weren't enough, Lawyer Conway testified that as of February 2006, he knew that they would likely be sued when this patent issued.

No notice? How can that be?

Let's take a look at Cheryl Lubbert. She was a Divisional Vice President for Abbott, and she testified, I think, about as directly as you can testify: When did Abbott first become aware of Exhibit 1, the patent? And it gives the patent number. That's would be when it issued.

Her testimony was: We were aware of it when it issued.

So they were aware of the patent before it came out as a patent. When they were allowed claims, they were aware of it, according to her. And she was a

corporate representative the day it issued.

And then finally, on this issue of willfulness, which your answer should be yes to, I want you to look at -- call up No. 3, please.

This is a document that you heard Attorney Conway testifying about in his -- the internal risk management strategy that was being followed by Abbott. And if you just take a look at that, it talks about they're going to target certain drugs, and they're going to go after them.

And in some cases will seek a license, but if they can't get a license, they're going to use an aggressive business IP strategy in risk management. You know what that says, folks?

That says we'll play hardball to get the drugs that we want.

And even down here below, it says we may not proceed if the target includes a large company with litigation resources. In other words, we'll pick on the little guys, but we'd better leave the big guys alone.

Well, in this case, they got sued and they got sued by a company that, fortunately, has the resources --

THE COURT: Five minutes.

MR. SAYLES: -- to stand up against them,

and that's what we're doing here.

Their infringement was willful, and they should have to answer for it on the damages.

And I want to turn to the damages. Now, you've got Dr. Slottje on the one hand, and that's their damages expert. And you've got Dr. Gering on the other hand.

Credibility is the issue, I believe.

Dr. Gering was not attacked or assailed in any material way.

Dr. Slottje got on the witness stand, and Dr. Slottje tried to make you believe that Humira and Remicade do not compete in the same market. Do not compete. And that was the reason for his low, low, low numbers.

Well, what is the most telling piece of evidence about that?

I'll show you what it is.

May I walk right over here for just a second, Your Honor?

THE COURT: All right.

MR. SAYLES: You see these three notebooks? These were the notebooks that Mr. Maslowski put up on the chair for Dr. Slottje to look at and ask him to pick any one.

What are those?

Those are marketing documents of Abbott.

What do they show?

They show that Humira and Remicade compete in the same indications, in the same market, and they show it every single month during the period that we're interested in in this case.

That's why Mr. Maslowski said just pick one. It didn't matter which one he picked.

And I'll tell you something else. That's why Abbott did not bring down here a marketing witness, because, you know, if a witness has written a chapter in a book, they might be able to eat that. If they have written an article, they might have to deal with that, and it might be shown that they have inconsistencies. But a marketing person could not take that witness stand and withstand cross-examination where a claim is made that these products do not compete time after time.

Now, let me go to the damage numbers here. You've heard the damage numbers. The lost profits is 1 billion, 168 million, 466 dollars (sic).

The reasonable royalty, let me tell you why a 15-percent reasonable royalty is reasonable. And that's 1 billion, 8 million, 256 thousand dollars. The reason that that is a reasonable royalty is the

industry average for a launched product is 11.6 percent. And if we've learned anything about this case during the trial of this case, this case is anything but average.

Humira is the largest product and most successful product that Abbott has ever sold, so there's nothing average about it at all. The product was launched at the time negotiations would take place. You heard that. That happens. The industry numbers show that that happens.

So they would have paid a higher than an average royalty rate, and that's how that number is justifiable and reasonable.

Now, in a moment, I'm going to sit down, but I want to tell you something. These damages that I've just gone over with you represent a fair amount of compensation. That's what they represent.

Are they large?

To be sure, they are. But the sales here are large, and that's why it is so.

There are no punitive damages or extra damages in here. They are lost profits and reasonable royalties. These numbers represent a full measure of justice. We ask you for a full measure of justice. Anything less, anything less than a full measure of justice, you see, includes partial injustice. If you

have less than full justice, you have partial injustice.

THE COURT: One minute.

MR. SAYLES: It's full justice.

So when you go back into the jury room, what we ask you to do -- and this is a complicated case in the science, but your common sense will guide you, and your common sense will come through.

Today -- today you are the most powerful group in Marshall Texas, the state of Texas, and perhaps in America. It is only here where we entrust our juries to make decisions like these, these important decisions.

Ms. Elderkin and I, and our whole team, have had a tremendous obligation to our client in bringing you this case. We have now discharged our burden and our obligation to our client.

We now give you the responsibility that you have to bring back a verdict that is grounded in the evidence, based on the Court's charge, and blessed by your conscience.

THE COURT: Thank you, Mr. Sayles.

Ladies and Gentlemen, it will take me about 45 minutes to read this charge. I think you ought to take a break.

So I tell you what, let's be ready to come back in at 10:25. We'll get in there a little

after 11:00. But let's take a break. This is too long to stay in here for another 45 minutes. So I'll see you back at 10:25.

COURT SECURITY OFFICER: All rise.

(Jury out.)

THE COURT: Counsel, I've got some question about this -- or condition on Question No. 3, so I'm going to look at it again. I may ask you to step in chambers here in about ten minutes. I want to look at it.

(Recess.)

(Jury out.)

THE COURT: All right. Please be seated.

We have a request from the Plaintiff?

MS. ELDERKIN: Yes, Your Honor. Plaintiff renews its JMOL motion on the anticipation by the Adair patent. As we had pointed out previously, there's been no evidence. No Abbott witness has ever compared --

MR. SAYLES: Salfeld. Salfeld.

MS. ELDERKIN: Salfeld. I'm so sorry. The Salfeld patent.

No witness ever compared the disclosure of the Salfeld patent to the claims, and there was not even any argument today even tying in the position that

the Salfeld patent anticipates.

So we don't believe it should go to the jury, and we request our -- renew our request for motion as a judgment of law, that it's not -- does not anticipate.

THE COURT: Mr. Lee, where is the evidence that the jury would be entitled to follow on an element-by-element comparison of the Salfeld patent?

MR. LEE: It's the Salfeld patent itself, Your Honor. And I argued it specifically. I said that Your Honor would identify Salfeld as prior art, that its filing date was 1996, and it was 2000 and that if it -- and I said that if it -- if it infringes, it anticipates. It can't be both ways. I argued that specifically today.

THE COURT: I know you argued that. I disagree with Ms. Elderkin on whether you argued it, but what evidence was there of -- from an expert that compared the -- element by element of the patent to the asserted claims?

MR. LEE: Your Honor, it was -- this is the same argument that we had with Your Honor before at the JMOL.

And we cited three cases that I don't have in front of me right now, where the Court of

Appeals has said that if the product that's accused of infringing is prior art, then the patent's invalid, and you don't need that element-by-element comparison. And that was specifically what we said.

THE COURT: Okay. I deny the motion.

Bring them in.

(Jury in.)

THE COURT: Please be seated, Ladies and Gentlemen.

Members of the Jury, you have heard the evidence that's been presented by the parties in this case, and now you've heard the argument of the respective attorneys in support of their positions.

It is now my duty to give you the charge in the case. It will be an oral charge, and I am giving it to you in an effort to assist you in your deliberations in deciding the issues which you must decide in order to reach a fair and impartial verdict in this case.

Perhaps this function of the Court is the most important one that the Court performs in the trial of the case, so I do ask that you pay close attention to my remarks.

You will remember that last Monday at the beginning of the trial, I gave you some general

instructions and definitions. Rather than repeat them all at this time, I will ask you to recall them in deciding the facts and issues which you are to decide.

As I instructed you at the beginning of the trial, you are the exclusive judges of the facts, the credibility of the evidence, and the weight to be given the testimony of the witnesses who testified. You are to perform this duty without bias or prejudice to any party. The law does not permit jurors to be governed by sympathy or prejudice.

A corporation and all other persons are equal before the law and must be treated as equals in a court of justice.

The Court and the parties expect that you will carefully and impartially consider all of the evidence, follow the law as I will give it to you, and reach a just verdict.

I instruct you that all persons, including the Plaintiffs and Defendants in this case, stand equal before the law and are to be dealt with as equals in this court. The law is no respecter of persons.

I'm going to now briefly review the contention of the parties and then give you some additional instructions and definitions that will guide

you in deciding the issues of facts that you must resolve in this case.

The Plaintiffs contend that the Defendants infringe certain claims of U.S. Patent No. 7,070,775, (that is, the '775 patent).

The claims alleged to be infringed are Claims 2, 3, 14, and 15 of the '775 patent. I will refer to these claims as the asserted claims and to the patent as the patent-in-suit.

The product alleged to infringe the '775 patent is Abbott's product, Humira. The Plaintiffs contend that they are entitled to damages caused by the infringement.

The Plaintiffs also contend that the Defendants' infringement was willful.

The Defendants deny that they have infringed the asserted claims of the patent-in-suit and also argue that all asserted claims of the patent-in-suit are invalid.

Now, the Plaintiffs bear the burden of proof by a preponderance of the evidence that the Defendants infringe the asserted claims of the patent-in-suit.

When a party has the burden of proof by a preponderance of the evidence, it means that you must be

persuaded by the evidence that the claim or affirmative defense is more likely true than not true.

Now, the Defendants bear the burden of proof by clear and convincing evidence that the asserted claims of the patent are invalid.

Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence, which only requires that the parties claim be more likely true than not true.

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means the party must persuade you that it is highly probable that the facts are as that party contends. Never -- nevertheless, the clear and convincing standard is not as high as the burden of proof applied in a criminal case, which is beyond a reasonable doubt.

Now I'm going to give you some further instructions that, hopefully, will help you in answering the questions to follow.

First, with respect to claim interpretation, to decide the questions of infringement and validity, you must first understand what the claims of the patent cover; that is, what they prevent anyone else from doing. This is called claim construction or claim interpretation.

It is my duty under the law to interpret what the words in the patent claims mean. I have made my determination. I will instruct you accordingly. You must apply the meaning that I am about to give you to both your decisions on infringement and validity.

I will now instruct you how those words are to be construed and understood when deciding the issues of infringement and validity in this case.

Now, you have been provided with written copies of the patent-in-suit and copies of the claim definitions, and you should use them during your deliberations.

With respect to the '775 patent:

The term anti-TNF-alpha means an immunoglobulin protein that binds to TNF-alpha.

The term human variable region means a variable region that is encoded by a gene derived from human DNA.

The term human light chain means light chain encoded by a gene derived from human DNA.

The term human heavy chain means heavy chain encoded by a gene derived from human DNA.

The term competitively inhibits binding of A2 (that is, ATCC Accession No. PTA-7045) to human TNF-alpha means competes with A2 (that is, ATCC

Accession No. PTA-7045) for binding to human TNF-alpha.

The term binds to a neutralizing epitope of TNF-alpha in vivo with an affinity of at least 1 times 10 to the 8th liter per mole measured as an association constant (that is, Ka) as determined by Scatchard analysis means results in a loss of biological activity when it binds to human TNF-alpha in vivo and associates (that is, binds) with human TNF-alpha with affinity of at least 1 times 10 to the 8th liter per mole as calculated using a method for data analysis known as a -- as a Scatchard analysis.

The term neutralizing epitope means a portion of TNF-alpha which, when bound by an antibody, results in a loss of biologic activity of TNF-alpha. The term recombinant means encoded by DNA made with recombinant DNA technology; for example, encoded by a gene that was split by splicing DNA.

All other claim terms have their plain and ordinary meanings as they would be understood by a person of ordinary skill in the art.

Fortunately, you have a copy of those definitions that I have just read to you in your notebook.

Now, with respect to determining infringement, once a patent is issued, the owner of the

patent has a right to exclude others from making, using, or selling the patented invention throughout the United States for a term of 20 years.

Thus, infringement occurs when a person, without the owner's permission, makes, uses, or sells a patented invention anywhere in the United States while the patent is in force.

To determine whether there is an infringement, you must compare the allegedly infringing product with the scope of the patent claims as I have defined them for you.

Now, in order to infringe a patent claim, a product must include each and every limitation of the claim. In determining whether Abbott infringes Centocor's asserted claim, you must determine whether Humira contains each and every limitation recited in a claim.

A claim limitation is present if it exists in Humira just as it is described in the claim language, either as I have explained that language to you or if I did not explain it, as it would be understood by one of skill in the art.

If such a product omits even a single limitation, then you must find that the claim is not infringed. You must consider each of the claims

separately.

If you find that each and every limitation of a patented claim is found in Humira, then the claim is infringed even if Humira may be more or less efficient or may include additional features or functions not found in the claims.

The fact that Abbott may have obtained patents on its product is not relevant to Centocor's claim of patent infringement.

Now, about dependent claims. My instruction on infringement so far have related to independent claims.

However, all of the claims in suit -- all of the claims in suit, Claims 2, 3, 14, and 15 of the '775 patent, are dependent claims.

Dependent claims includes each of the limitations of the independent claim from which it depends, plus additional elements.

For the claims in this case, Dependent Claims 2 and 3 depend from Claim 1, and Dependent Claims 14 and 15 depend from Claim 13.

Therefore, for Dependent Claims 2 or 3 to be infringed, all of the elements of Independent Claim 1 must also be present in the accused product.

Likewise, for the Dependent Claims 14

or 15 to be infringed, you must find that all of the elements of Independent Claim 13 are present in the accused product.

With respect to willful infringement, the Plaintiffs claim that the Defendants infringe their patent willfully.

Although you must determine whether the Defendants' infringement was willful, this determination will not affect the amount of damages, if any, that you assess. The purpose of your determination is to assist the Court in making decisions that I will -- that it will have to make.

The Plaintiffs must prove willfulness by clear and convincing evidence. To prove willful infringement, the Plaintiffs must first prove that the Defendants infringed a valid claim of the Plaintiffs' patent. The requirements for proving infringement were discussed in my prior instructions.

The fact that you may have determined that the Defendants were wrong and the patent is infringed does not mean that the Defendants' infringement was willful.

To prove willful infringement, the Plaintiffs must prove that it is highly probable that the Defendants acted with reckless disregard of the

claims of the Plaintiffs' patent.

To demonstrate such reckless disregard, the Plaintiffs must satisfy a two-part test.

The first part of the test is objective. The Plaintiffs must prove that the Defendants acted, despite an objectively high likelihood that its actions constitute -- constituted infringement of a valid patent.

The state of mind of the Defendants is not relevant to this inquiry. You should focus on whether a reasonable person in the position of the Defendants -- the Defendants, after learning of the patent, could have reasonably believed that it did not infringe or that the patent was invalid.

If a reasonable person in the position of the Defendants could not have held such a belief, then you need to consider the second part of the test.

The second part of the test looks to the Defendants' state of mind. If you find that the Defendants proceeded in the face of an unjustifiably high risk, then you must determine whether that risk was known or obvious to the Defendants.

The Plaintiff -- Plaintiffs must prove that the Defendants actually knew or it was so obvious that the Defendants should have known that its actions

constituted infringement of a valid patent.

In deciding whether the Defendants satisfied the second part of the test, you could -- you should consider all of the facts surrounding the alleged infringement, including but not limited to the following:

No. 1. Whether the Defendants, when they learned of the patent, investigated the scope of the patent and formed a good-faith belief that the patent was invalid or that it was not infringed before the Defendants started or continued in a possible infringing activity;

No. 2. Whether the Defendants intentionally copied without a -- without a reasonable basis, a product covered by the patent, as distinguished from trying to design around the patent by designing a product that the Defendants believed did not infringe the patent;

No. 3. Whether the Defendants had a substantial defense to infringement and reasonably believed that the defense would be successful in litigation;

And finally, No. 4. Whether the Defendants tried to cover up their infringement.

Now, none of these factors is

determinative, and the list of factors is not an exhaustive list of things you should consider. Your determination of willfulness should incorporate the totality of the circumstances.

With respect to validity, now, Abbott contends that the asserted claims of the patent-in-suit are invalid.

A patent issued by the United States Patent Office is presumed to be valid. In order to rebut this presumption, Abbott must establish by clear and convincing evidence that an asserted claim of the patent-in-suit is not valid for each claim of a patent is presumed valid regardless of the status of any other claim in the patent.

I will now instruct you on the invalidity issues that you have to decide in this case. You may consider the following invalidity defenses and no other. First, with respect to the date of invention and priority date.

Many of the validity issues refer to the date the invention -- the date the inventor made the invention or the date the application was filed. These are called the, quote, date of invention or, quote, filing date.

I will now instruct you how to determine

these dates.

Under the patent laws, the date of the invention is generally the date that the patent application was filed. This is also referred to as a constructive reduction to practice.

Inventors, however, are permitted to file multiple applications in a series that are directed to the same subject matters.

In these circumstances, inventors may attempt to assert an earlier constructive reduction to practice by relying on the application filed before the application that actually matured into the patent. This is called claimed priority to an earlier filed application.

The series of patent applications involved in this case were filed between 1991 and 2002.

The '775 patent issued directly from an application that was filed on July the 18th, 2002.

Therefore, the latest possible date of the invention is July 18th, 2002.

Now, you are instructed that for purposes of this case, Centocor may attempt to claim priority only to the application filed on or after February 4, 1994.

I will refer to the applications filed on

or after February 4, 1994, as priority applications and the date on which the applications were filed as a priority date.

To provide an earlier date of invention, a priority application must satisfy the written description and enablement requirements. In a moment, I will give you further instruction concerning these requirements.

Centocor contends that the priority application satisfies -- satisfies these requirements and does provide the earlier date of invention. Abbott disagrees.

Abbott bears the burden of proof, by clear and convincing evidence, that the priority applications do not satisfy the written description and enablement requirements.

It will be your job to determine the application to which Centocor may claim priority by applying my instructions on written description and enablement.

First, with respect to enablement, the written description set forth in a patent must disclose sufficient information to enable one skilled in the field of invention to make and use the claimed invention.

The full scope of the claimed invention must be enabled. This requirement is known as the enablement requirement.

Abbott contends that the priority applications do not satisfy the enablement requirement because the written description in those written applications does not enable the asserted claims in the '775 patent.

If you find that a priority application does not enable the asserted claims, the application cannot be used to support a priority date.

Abbott also contends that the written description of the '775 patent does not enable the asserted claims. If the claims of a patent are not enabled, they are not valid.

In considering whether written description of a patent satisfies the enablement requirement, you must keep in mind that patents are written for persons of skill in the field of the invention.

Thus, a patent need not expressly state information that skilled persons would be likely to know or could obtain.

Abbott bears the burden of establishing lack of enablement by clear and convincing evidence.

A written description is enabling so long as undue experimentation is not needed to make or use the invention.

The fact that some experimentation may be required for a skilled person to make or use the claimed invention does not mean that a patent's written description fails to meet the enablement requirement.

Factors that you should -- that you may consider in determining whether the written description would require undue experimentation include:

(1) the quantity of the experimentation necessary;

(2) the amount of direction or guidance disclosed in the patent;

(3) the presence or absence of working examples in the patent;

(4) the nature of the invention;

(5) the state of the prior art;

(6) the relative skill of those in the art;

(7) the predictability of the art;

And (8) the breadth of the claims.

With respect to written description, Abbott also contends that the priority applications in the '775 patent do not contain an adequate written

description of the claimed invention.

The purpose of this written description requirement is to make sure that a patent describes the technology it seeks to claim as an invention and to demonstrate that the inventor was in possession of the invention at the time of the application where the patent was filed, even though the claims may have been changed or new claims added during the prosecution of the application.

The written description requirement is satisfied if a person of ordinary skill in the field reading the patent application as originally filed would recognize that the patent application described the invention as claimed, even though the description may not use the exact words found in the claim.

An adequate written description requires a precise definition, such as by structure, formula, chemical name, or physical properties, not a mere wish or plan for obtaining the claimed chemical invention. It is not necessary that each and every aspect of the claim be discussed, as long as a person of ordinary skill would understand that the missing aspect is necessarily implied in the patent application as originally filed.

If you find by clear and convincing

evidence that a priority application does not contain a adequate written description of the invention, then Centocor cannot rely on the priority date of that application.

If you find that the '775 patent does not contain an adequate written description of the claimed invention, then you should render a verdict for the Defendants.

With respect to prior art, now, generally, under the patent laws, a person is entitled to a patent only if the invention claimed in the patent is new and non-obvious in light of what came before. That which came before the invention is referred to as prior art.

Abbott is relying on various items of prior art. Abbott must prove by clear and convincing evidence that these items are prior art. In order to do so, Abbott must prove that the items fall within one or more of the different categories of prior art recognized by the patent laws.

These categories include anything that was patented or described in a printed publication anywhere in the world before the inventor made the invention or more than one year before the application to which Centocor can claim priority was filed.

With respect to anticipation, a person cannot obtain a patent on an invention if someone else has already made the same invention. In other words, the invention must be new.

If an invention is not new, we say it was anticipated by the prior art. An invention that is anticipated by the prior art is not entitled to patent protection.

A party challenging the validity of a patent must prove anticipation by the clear and convincing evidence standard.

For a patent claim to be anticipated by the prior art, each and every limitation of the claim must be present within a single item of prior art and must be arranged or combined in the same way as in the claim.

In analyzing this issue, do not focus on any features shown in the written description that are not asserted -- that are not included in the asserted claims. You may not find that the prior art anticipates a patent claim by combining two or more items of prior art.

A printed publication or patent will not be an anticipation unless it contains a description of the invention covered by the patent claims that is

sufficiently detailed to teach a skilled person how to make and use the invention without undue experimentation.

That means that a person skilled in the field of invention reading the printed publication or patent would be able to make and use the invention using only an amount of experimentation that is appropriate for the complexity of the field of the invention and for the level of expertise and knowledge of persons skilled in that field.

In deciding whether or not a single item of prior art anticipates a patent claim, you should consider that which is expressly stated or present in the item of prior art and also that which is inherently present.

Now, something is inherent in an item of prior art if it is a natural result that flows from the disclosure in the prior art.

Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient to show inherency. If you find that Abbott has provided clear and convincing evidence that any claims asserted against it are anticipated by prior art, then you must find that

those claims are invalid.

With respect to printed publications, Abbott contends that the asserted claims are anticipated because of the disclosures and prior printed publication.

Abbott contends that Claims 2, 3, 14, and 15 of the '775 patent are anticipated by the Adair 1992 European patent application and United States Patent No. 6,090,382. That's the Salfeld patent.

Printed publications from anywhere in the world are prior art if the printed applications were published either before the inventor made the claimed invention or more than one year before the earliest application to which you find Centocor may claim priority.

If a printed publication was published more than one year before the application to which the Plaintiffs can claim priority was filed, then that publication will be prior art, regardless of the date of invention for the patent claims. The date of invention is irrelevant to this category of prior art.

A printed publication will not be an anticipation unless it contains a description of the invention covered by the patent claims that is sufficiently detailed to teach a person of ordinary

skill in the art how to make and use the invention without undue experimentation.

That means that a person of ordinary skill in the field of the invention reading the printed publication would be able to make and use the invention using -- using only an amount of experimentation that is appropriate for the complexity of the field of invention and for the level of expertise and knowledge of persons of ordinary skill in that field.

With respect to damages, I will now instruct you as to the calculation of the damages should you find that the Plaintiffs have met their burden on any of their claims.

If you find that the Defendants have infringed any of the claims of the Plaintiffs' patent and that these claims are valid, then you should consider the amount of money the Plaintiffs should receive as damages.

The Plaintiffs have the burden of proving by a preponderance of the evidence the amount of damages caused by the Defendants' infringement.

Now, even though I am instructing you on how you should measure damages, this should not be taken to mean that I believe that the Defendants have infringed. These are issues for you to resolve under

the instructions I have given you.

I am instructing you on damages only so that you will have guidance should you decide that the Plaintiffs are entitled to recover.

The amount of damages Plaintiffs can recover is limited to those acts of infringement by the Defendants that occurred after the Plaintiffs gave the Defendants notice that they infringed the '775 patent. Notice means that the Plaintiffs communicated to the Defendants a specific charge of infringement of the '775 patent by Humira. This notice is effective as of the date given.

The Plaintiffs contend that the Defendants had notice of infringement from the date the '775 patent issued, July 4, 2006.

The Defendants contend that they had notice on the date that the lawsuit was filed, April 16th, 2007.

The Plaintiffs have the burden of establishing by a preponderance of the evidence the date on which the Defendants received notice of infringement. Your job is to calculate damages from the date you find the Defendants received notice.

At the latest, the Defendants received notice of infringement on the date the suit was filed.

You should not award damages for any infringement by the Defendants occurring before they first received notice of the '775 patent.

Now, in addition, you're instructed that as a result of an agreement entered into in 2000 between Centocor and Abbott, it has been determined that Abbott has a license to the '775 patent with respect to Humira that qualifies as a co-administration product.

Co-administration product means Humira that is actually used in combination with Methotrexate in the United States, and Humira used as an adjunctive therapy to Methotrexate in certain EU countries. As a result of this license, Abbott is authorized to make, use, and sell Humira qualifying as a co-administration product, and no damages may be awarded for such conduct.

Now, the existence of this license is not relevant to the issues of infringement or validity of the patents-in-suit. It is only -- it is relevant only to the issue of damages.

The Plaintiffs are asking for two types of damages for the alleged patent infringement in this case.

The first type of patent damages is lost profits. Briefly, lost profits compensate the patent

owner for the additional profits that it would have been if the accused infringer had not infringed.

You may hear this referred to as the but-for test. I will discuss lost profits in more detail shortly.

The second type of patent damages is called reasonable royalty. I will also discuss reasonable royalty later in more detail.

Generally, a reasonable royalty is defined by the patent laws as the reasonable amount that someone wanting to use the patented invention should expect to pay to the patent owner and the patent owner should expect to receive.

A reasonable royalty is the minimum amount of damages that a patent owner may recover. With respect to lost profits, I will first instruct you about lost profit damages.

Simply stated, lost profit damages are the profits the Plaintiffs lost because of the infringement. They are not the profits the Defendants made.

The Plaintiffs have the burden to show that it was more probable than not that they would have made additional profits if the Defendants had not infringed.

The Plaintiffs may receive damages for lost profits only on those products that compete with the Defendants' products that you find to infringe.

The Plaintiffs may not receive lost profit damages for other products or services that might be sold along with the competing products for convenience or business advantage but that are not functionally part of the competing product.

You must also consider whether or not, if the Defendants' infringing product was not available, some or all of the people who bought from the Defendants would have bought a different non-infringing product from the Defendants or from somebody else rather than buy from the Plaintiffs.

In deciding whether or not people who bought from the Defendants would have bought a non-infringing product, you should consider whether or not there was such a demand for the patented aspect of the infringing product that the purchasers would not have bought a non-infringing product.

If you find infringement, you may consider demand for the accused product to be a demand for the patented invention.

It is not necessary for the Plaintiffs to prove that the Plaintiffs and the Defendants were the

only two suppliers in the market in order for the Plaintiffs to demonstrate entitlement to lost profits. If the realities of the marketplace are such that non-infringing substitutes were available from suppliers who would have made some but not all of the sales were made by the Defendants, then the Plaintiffs may be entitled to the lost profits on a portion of the infringing sales.

The burden is on the Plaintiffs, however, to show a reasonable probability that they would have sold that portion if the Defendants' product had never existed.

If the Plaintiffs have proved that they lost profits due to infringement by the Defendants, then you are to find an amount of profits that it lost. The Plaintiffs must prove the amount of lost -- their profit loss by a -- to a reasonable probability. The amount of lost profit damages should not include amounts that are merely speculation.

With respect to reasonable royalty, Plaintiffs are also asking damages in the amount of a reasonable royalty.

A royalty is the amount of money a licensee pays to a patent owner for each article the licensee makes or uses or sells under the patent.

A reasonable royalty is the amount of money a willing patent owner and a willing prospective licensee would have agreed upon at the time of the infringement for a license to make the invention.

In making your determination of the amount of a reasonable royalty, it is important that you focus on the time period when the infringer first infringed the patent and the facts that existed at that time.

Your determination does not depend on the actual willingness of the parties to this lawsuit to engage in such negotiations. Your focus should be on what the parties' expectations would have been had they entered negotiations for royalties at the time of the infringing activity.

The infringer's actual profits may or may not bear on the reasonableness of an award based upon a reasonable royalty.

In determining a reasonable royalty, you should consider all the facts known and available to the parties at the time the infringement began.

Some of the kinds of factors that you may consider in making your determination are:

(1) whether the patent holder had an established royalty for the invention; the absence of --

in the absence of such a licensing history, any royalty arrangements that were generally used and recognized in the particular industry at that time;

(2) the nature of the commercial relationship between the patent owner and the licensee, such us whether they were competitors or whether their relationship was that of an inventor and a promoter;

(3) the established profitability of the patented product, its commercial success, and its popularity at the time;

(4) whether the patent holder had an established policy of granting licenses or retaining the patented invention as an exclusive right or whether the patent owner had a policy of granting licenses under special conditions designed to preserve his monopoly;

(5) the size of the anticipated marketed invention at the time the infringement began;

(6) the duration of the patent and of the license, as well as the terms and scope of the license such as whether it was exclusive or nonexclusive or subject to territorial restrictions;

(7) the rates paid by the licensee for the use of other patents comparable to the Plaintiffs' patent;

(8) whether the licensees' sales of the

patented invention promote sales of its other products and whether the invention generates sales to the inventor of his non-patented items;

(9) the utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results;

(10) the extent to which the infringer used the invention and any evidence probative of the value of such use;

(11) the portion of the profits in the particular business that are customarily attributable to the use of the invention or analogous invention;

(12) the portion of the profits that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant fixtures -- features or improvements added by the infringer;

(13) the opinion and testimony of qualified experts and of the patent holder;

And (14) any other factors which, in your mind, would have increased or decreased the royalty the infringer would have been willing to pay and the patent owner would have been willing to accept acting as normally prudent business people.

You must not award the Plaintiffs more

damages that are adequate to compensate for the infringement nor shall you include any additional amount for the purpose of punishing the Defendants or setting an example.

You must not consider the Plaintiffs' allegation of willfulness in considering the damages or take into account any evidence relating to those damages. Consideration of willfulness is entirely separate from the question of damages.

You may not increase damages because you find willfulness or decrease because you did not find willfulness, nor may you include damages that are speculative, damages that are only possible, or damages that are based on guesswork.

Nothing that I may have said or done during the course of this trial is intended to indicate any view of mine as to which party should or should not win this case.

As I instructed you previously, the jury is the sole judge of the credibility of the testimony and the weight to be given the evidence.

Now, these instructions are given to you as a whole. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

You have heard all of the evidence in the case. You have heard the argument of counsel. The Court has given you the charge in this case.

In just a few moments, you will retire to the jury room, select one of your members to act as foreperson, and begin performing the function for which you have been chosen and for which you have been impaneled in accordance with the oath that you took as jurors.

You will remember at the beginning of the trial and throughout this trial, I have admonished you not to discuss the case with each other until it was submitted to you.

Well, now is the time for you to begin your discussions, and you certainly may express an opinion from the evidence that you have heard and use any reasonable means to persuade other members of the jury to your convictions and to your honest opinion.

You are to reach a verdict which speaks the truth and which does justice to all parties without favor, bias, or prejudice in any particular, either for or against any party to this lawsuit.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if convinced it is erroneous.

But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning your verdict.

Now, the verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

As soon as you made the -- or have reached your verdict, you will let this fact be known to the officer.

Mr. Potts, you staying with them?

COURT SECURITY OFFICER: I will be, Your Honor.

THE COURT: Mr. Bill Potts, your CSO, and he will report to the Court.

Now, your verdict is going to be in the form of questions for you to answer. You will take these questions to the jury room, and when you have reached a unanimous agreement as to your verdict, you will have your foreperson fill in, sign, and date the form, then advise Mr. Potts, your security officer, that you've reached a verdict.

During your deliberations, you may have any of the exhibits which have been offered into

evidence, and the Court will send them to you upon written request.

If you desire further instructions, your foreperson may make this known in writing, and the Court will try to comply with your request.

All communications with the Court must be in writing, but at no time should you indicate to the Court or to anyone else how the jury is divided in answering any particular question.

Any notes that you have taken during this trial are only aids to your memory. If your memory should differ from your notes, then you should rely on your memory and not on the notes. The notes are not evidence.

A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors.

Notes are not entitled to any greater weight than the recollection or impression of each juror concerning the testimony.

You are now in charge of when you take your breaks, when you take your lunch break. I think you understand by now that I generally take lunch around 12 o'clock.

So if you want to send me a note, I probably won't be here from 12:00 to 1:00.

At this time, I'm going to hand the questions to Mr. Potts, your security officer. If you'll follow him into the jury room and commence your deliberations in accordance with my instructions. I'm about to hand you the charge.

COURT SECURITY OFFICER: All rise for the jury.

(Jury out.)

THE COURT: Please be seated.

It's been called to my attention that in reading the -- what -- the defined terms, that I left off one phrase, that one time I did not say at least 1 times 10 to the 8th liter per mole. They've got that in writing.

You want me to call it back in here and read it to them again? Anything from the Plaintiff?

MS. ELDERKIN: There's no need, Your Honor.

MR. LEE: No, Your Honor.

THE COURT: Okay. Anything from the Plaintiff at this time?

MR. SAYLES: Nothing at this time, Your Honor.

THE COURT: And from the Defendant?

MR. BECK: Nothing, Your Honor. As I understand it, the Court has excused me because of another matter tomorrow morning?

THE COURT: What time did you need to leave?

MR. BECK: Hopefully, right after lunch.

THE COURT: Hopefully. Mr. Beck, you can leave anytime you want to.

MR. BECK: Thank you, sir.

THE COURT: Stop counsel -- get your group together -- if you're leaving, get the group together and come in before you leave. I'll have something to say to you, I'm sure, off the record. Court's in recess pending a verdict.

(Recess.)

* * * * *

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_____ _____
SUSAN SIMMONS, CSR Date
Official Court Reporter
State of Texas No.: 267
Expiration Date: 12/31/10

/s/_____ _____
JUDITH WERLINGER, CSR Date
Deputy Official Court Reporter
State of Texas No.: 731
Expiration Date 12/31/10